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Nos. 04-277 & 04-281

IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, ET AL.,
PETITIONERS,
AND
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
PETITIONERS,
V.
BRAND X INTERNET SERVICES, ET AL.,
RESPONDENTS.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS BRAND X INTERNET SERVICES AND CENTER FOR DIGITAL DEMOCRACY IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly held that, under the statutory definitions contained in the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et. seq.*, and contrary to the Declaratory Ruling by the Federal Communications Commission, cable modem service includes both "information service" and "telecommunications service" components.

PARTIES TO THE PROCEEDING

Respondents adopt the list of parties to the proceeding in the court of appeals contained in the Petition for a Wrjt of Certiorari filed by the Federal Communications Commission and the United States.

RULE 29.6 DISCLOSURE

Respondent Brand X Internet Services is a privately held company, incorporated in California. It has no parent or subsidiaries.

Respondent Center for Digital Democracy is a not-for-profit corporation incorporated in the District of Columbia.

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STATEMENT

Brand X Internet Services and the Center for Digital Democracy submit that the petitions should be denied.

There are thousands of Internet Service Providers (ISPs), most offering service over traditional telephone dial up connections.[1] With the advent of cable modems (devices to connect users to the Internet over cable lines) in the mid-1990s, consumers also became able to access the Internet over cable lines at speeds many times faster than dial up connections.[2] ISPs, whether they had access to broadband cable facilities or only dial up, competed then (as now) to provide customers content, email, access to newsgroups, the ability to create a personal web page and access to the WorldWide Web.[3] Those with access to the cable system, however, had (and still have) a competitive leg up. As the FCC has noted, broadband allows subscribers the ability to "utilize more sophisticated 'real time' applications," to "view streaming video" and to make better use of private network Intranets.[4] Cable companies, however, have generally been unwilling to offer competing ISPs access to their cable lines,[5] claiming either that full non-discriminatory access would discourage investment in broadband deployment[6] or was beyond the FCC's authority to require.[7] As a result, they became nearly exclusive providers of Internet service at high

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[1] *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 F.C.C.R. 19287, ¶¶ 6-9 (2000) [hereinafter *NOI*].

[2] *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Declaratory Ruling*, 17 F.C.C.R 4798, ¶ 99 and n.21 (2002) [hereinafter *Declaratory Ruling*].

[3] *Declaratory Ruling*, *supra* note 2, at ¶ 10.

[4] *Id.* at ¶ 117.

[5] *See, e.g., Declaratory Ruling*, *supra* note 2, at ¶¶ 47.

[6] *Id.* at n.176.

[7] *See* Comments of National Cable & Telecommunications Ass'n (Dec. 1, 2000), [hereinafter NCTA Comments], *passim*, available at http:gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512159666 through 512159668 (last visited Sept. 20, 2004).

speeds.[8] While that status has changed somewhat with (1) the deployment by phone companies of another broadband platform -- digital subscriber line ("DSL") technology,[9] (2) the limited availability of other nascent broadband technologies, such as fixed wireless,[10] two-way satellite transmission,[11] and broadband over electric powerlines[12] and (3) limited access arrangements prompted by the threat of government intervention by the Justice Department's Antitrust Division and the Federal Trade Commission,[13] the broadband market remains, by the FCC's account, "very highly concentrated,[14]" a market in which cable holds a 60 percent share[15] and both cable operators and telephone companies offering DSL service "have raised their prices for high-speed Internet access services."[16]

This case concerns the FCC's classification of cable modem service as exclusively an interstate "information

[8] *Declaratory Ruling, supra* note 2, at ¶¶8-10; *NOI, supra* note 1, at ¶ 29.
[9] *Declaratory Ruling, supra* note 2, at ¶ 9.
[10] *Id.*
[11] *Id.*
[12] *See, e.g., In re Carrier Current Systems, including Broadband over Power Line Systems Notice of Inquiry* 19 F.C.C.R. 3335 (2004) (hereinafter *BPL Inquiry*).
[13] *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors to AOL Time Warner Inc., Transferee,* 16 F.C.C.R. 6547 (2001) (*FCC AOL Time Warner Merger Order*); (America Online, Inc. and Time Warner, Inc.,) Federal Trade Commission, No. C-3989, File No. 0010105, Decision and Order (Dec. 14, 2000)(FTC AOL Time Warner Merger *Order*).
[14] *In re Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Notice of Proposed Rulemaking and Memorandum Opinion and Order,* 18 F.C.C.R. 6722, ¶ 123 (2003) (the *average* broadband market, it found, had an HHI concentration index of 5400, three times what the Justice Department's Antitrust Division considers competitively troublesome).
[15] *Id.*
[16] *Declaratory Ruling, supra* note 2, at ¶ 9.

service" under the 1996 Telecommunications Act, exempt from the common carrier obligations that would flow if the underlying transmission component of the service were instead found to be a "telecommunications service" under the Act. While the case had its immediate origins in what has been termed the cable "open access" debate, i.e., whether cable companies offering Internet service over their high speed, *i.e.*, "broadband" cable facilities are required under the provisions of the '96 Act to provide competing ISPs with non-discriminatory access to their systems, the statutory provisions in question actually incorporate FCC regulatory concepts that trace back to the early 1970s. It was then that "the FCC began wrestling with fundamental questions concerning the observed growing convergence between the 'modern-day electronic computer' and 'communication common carrier facilities and services.'"[17] That process led the FCC in *Computer I*[18] to develop distinctions between regulated common carrier transmission services and largely unregulated and competitive data processing services[19] delivered *via* telephone transmission networks. To protect competition in data processing services, the telephone companies that wished to offer both services were required to offer them separately.[20]

[17] Richard S. Whitt, *A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model*, 56 Fed. Comm. L.J. 587, 597 (2004)[citation omitted].
[18] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities,* 28 F.C.C. 2d 267 (1971), *aff'd in part sub nom. GTE Serv. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1975) (hereinafter *Computer I*).
[19] *Computer I, supra* note 18, defined data processing as the "use of a computer for the processing of information as distinguished from circuit or message-switching." *Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 203 n.6 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) [hereinafter *CCIA*].
[20] *CCIA, supra*, 693 F.2d at 203.

By 1980, the FCC had refined these distinctions, adopting in *Computer II* [21] "bright line" [22] definitions of regulated "basic" services[23] and largely unregulated "enhanced" services. [24] As it had in *Computer I*, the FCC sought to address the concern that "carriers would gain an unfair competitive edge by discriminating in favor of their own enhanced service offerings in providing access."[25] Companies owning transmission networks could not avoid regulation of basic services, the FCC made clear, by simply combining those services with an offer of enhanced services:

> Bell Atlantic seems to reason that because enhanced services are not common carrier services under Title II, the basic services that underlie enhanced services are somehow also not subject to Title II. We do not agree. Enhanced services by definition are services "offered over common carrier transmission facilities." Since the *Computer II* regime, we have consistently held that the addition of the specified types of enhancements (as defined in our rules) to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations, whether federal or state, with respect to that service.

In Re Filing and Review of Open Network Architecture Plans, Memorandum and Order, 4 F.C.C.R. 1, 141 (1988) [hereinafter Open Network Architecture Plans].[26]

In the mid-1990s Congress debated the need to overhaul the 1934 Federal Communications Act in light of technological changes and its desire to promote competition between the established national telephone companies and new carriers, ultimately adopting the Telecommunications Act of 1996. Congress codified the FCC's *Computer II* framework in the '96 Act, and specifically the concepts of "basic" and "enhanced" services that, as the FCC has noted, were directly incorporated into the '96 Act as "telecommunications services" and "information services," [27] respectively. [28] Recognizing the likely increasing importance

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[21] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision*, 77 F.C.C.2d 384 (1980), *Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) [hereinafter *Computer II*].

[22] *California v. FCC*, 905 F.2d 1217, 1224 (9th Cir. 1990).

[23] "The FCC defined basic service as the offering of a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *CCIA, supra* note 19, at 205 n.18.

[24] Enhanced services were defined as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Act." 47 C.F.R. § 64.702(a) (2004).

[25] *California v. FCC*, *supra*, 905 F.2d at 1224.

[26] *Open Network Architecture Plans* was an order issued under the FCC's *Computer III* regime. *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry Phase I Order)*, 104 F.C.C.2d 958 (1986), *rev'd, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), *cert. denied* 115 S.Ct. 1427 (1995) [hereinafter *Computer III*). *Computer III* had modified certain of the strict structural separation requirements established in *Computer II*, but *Computer III* retained the *Computer II* regulatory framework. What was common to its decisions in *Computer II* and *III* was that under both rules all carriers that own transmission facilities and provide enhanced services (irrespective of whether they had market power) unbundle the transmission path and provide it to other enhanced service providers "under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations." *Petition for Declaratory Ruling that AT&T's Interpass Frame Relay Service is a Basic Service*, 10 F.C.C.R. 13717, 13719 ¶¶ 13-14 (1995), [hereinafter Frame Relay Order].

[27] *See* 47 U.S.C. § 153(43)(2004) ("telecommunications"); 47 U.S.C. § 153(46)(2004) ("telecommunications service")and 47 U.S.C. § 153(20) (2004) ("information services")

[28] As the FCC explained:

> In section 623(b)(1) of the Appropriations Act, Congress directed us to review the Commission's interpretation of these definitions, and to explain how those interpretations are consistent with the plain language of the 1996 Act. Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these

of broadband technologies to the delivery of information services, it also added provisions to the Act encouraging the FCC to eliminate unnecessary barriers to the deployment of broadband,[29] requiring it to report periodically on the status of broadband deployment[30] and clarifying that "telecommunications services" used to deliver information services would not be limited to telephone wires. On the latter point, Congress expanded on the *Computer II* framework by expressly providing that telecommunications services would be defined by their function, not the medium used to provide them: "A provider of telecommunication services is a 'telecommunications carrier,' which the Act treats as a common carrier to the extent that it provides telecommunications for the public, *'regardless of the facilities used.'* 47 U.S.C. §153 (44) & (46) (2004)." *AT&T Corp. v. City of Portland,* 216 F.3d 871, 877 (9th Cir. 2000) (emphasis added).

The first application of the new Act to "integrated broadband services" came in 1998 when the FCC ruled that Internet access via DSL included both information service and telecommunications service components:

> An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.

Brand X Internet Services v. FCC, 345 F.3d 1120, 1137 (9th Cir. 2003) (quoting *Deployment of Wireline Servs. Offering Advanced Telecommunications Capability*, 13 F.C.C.R. 24,012, 24,030 (1998)) [hereinafter *Deployment of Wireline*] (Thomas, concurring). As under *Computer II*, the FCC held that while telephone companies could offer an integrated communications and information service to the public, they were also under "a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services" used to deliver their own information services to end users. *Deployment of Wireline* at 24,030.

One of the other broadband technologies to develop in the mid-1990s, as noted earlier, was the use of coaxial cables and cable modems to provide a high speed connection to the Internet. It was not until 1998, however, that the FCC first considered the issue of "what, if any, regulatory treatment should be applied to cable modem service." *Declaratory Ruling* at ¶ 2. Although it "considered" the issue, unlike the case with classification of DSL broadband, the FCC did not decide anything. By the agency's own description it had ducked making a decision on the classification of cable modem service the numerous times it had come up, "including a complaint case, license transfer reviews in connection with mergers involving cable operators, and a special report by the Commission's Cable Services Bureau." *Id.* By 2003, it had avoided the issue "no less than six times." *NCTA v. Gulf Power Co.*, 534 U.S. 327, 357 (2003) (Thomas, J. and Souter, J., concurring and dissenting).

The FCC's self-described "hands off" policy[31] was on full display when, in 1999, after having elected to participate as *amicus*, it declined to voice its views to the

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new terms to build upon frameworks established prior to the passage of the 1996 Act. *Specifically, we find that Congress intended the categories of "telecommunications service" and "information service" to parallel the definitions of "basic service" and "enhanced service" developed in our Computer II proceeding, and the definitions of "telecommunications" and "telecommunications service" developed in the Modification of Final Judgment breaking up the Bell system.*

In re Federal-State Joint Board on Universal Service, Report To Congress, 13 F.C.C.R. 11501, 11511 (1998) (emphasis added); *see also Declaratory Ruling, supra* note 2, at ¶ 34 n.139 (basic/enhanced distinction incorporated into 1996 Act).

[29] Pub. L. No. 104-104, Title VII, § 706(a).

[30] Pub. L. No. 104-104, Title VII, § 706(b).

[31] *NOI*, *supra* note 1, at ¶ 4.

Ninth Circuit in a case where the cable modem classification issue was squarely presented. *NOI*, ¶ 12. At the time, the development of cable modem technology and the cable industry's position on access became causes for alarm for both independent ISPs, several consumer groups and a number of communities, who viewed cable company dominance of Internet service at high speeds as likely to limit consumer choice and to raise the price of Internet service. *Id.* A number of these parties, led by AOL,[32] formed the Open Net Coalition to advance the cause of cable open access. *NOI*, ¶ 28. At about the same time, several communities, voicing similar concerns, sought to attach "open access" conditions to the transfer or merger of cable franchises in a number of cities. *NOI*, ¶ 13. One of these cities was the City of Portland, Oregon, which required AT&T to offer cable modem service on a non-discriminatory basis as a condition of its acquisition of the Portland cable system. *Id.*

AT&T challenged Portland's actions in federal district court, arguing that cable modem service was a cable service under the '96 Act, but that the condition exceeded the City's limited authority to regulate cable service under the Act. When the district court upheld the City's position, AT&T appealed the decision to the Ninth Circuit. The Ninth Circuit agreed with AT&T that the City had exceeded its limited authority to regulate cable franchises, but not for the reason AT&T had advocated.

Cable modem service, it held, was not "one-way transmission" and hence not a "cable service" under 47 U.S.C. § 522, so no approval was needed from the City for AT&T to "provide cable broadband Internet access without a cable service franchise." 216 F.3d at 876-77. To ascertain

[32] Following its merger in 2000 with the Time Warner cable system, AOL dropped its support for open access requirements. Reza Dibadj, *Toward Meaningful Cable Competition: Getting Beyond the Monopoly Morass*, 6 N.Y.U. J. Legis. & Pub. Policy 245, 258 (2003) ("AOL switched sides and suddenly became opposed to open access once it was acquired by Time Warner.")

"whether Portland may condition AT&T's provision of standard cable service," the court concluded that it also had to determine how the Communications Act defines cable modem service. *Id.* at 877. On this point, it held that the City did not have the authority to require open access to cable modem service as a condition of AT&T's offering of "standard cable service" because it found that cable modem service includes a telecommunications service and because the statute expressly forbids local cable authorities from requiring cable companies to offer telecommunications services. *Id.* at 878-79. In conducting its statutory analysis the court looked "first to the plain language of the statute," *Id.* at 876, and, noting that the FCC had "declined, both in its regulatory capacity and as *amicus curiae*, to address the issue," concluded that it was "not presented with a case involving "potential deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine." *Id.* Further observing that its interpretation was consistent with the agency's own interpretation of the '96 Act as applied to "DSL service, a high speed competitive cable broadband," *Id.* at 879, the court concluded that cable modem service consisted of both an information service and a telecommunications service subject to the common carriage requirements of Sections 201 and 202 of the Communications Act:

> Under the statute, Internet access for most users consists of two separate services. A conventional dial-up ISP provides its subscribers access to the Internet at a 'point of presence' assigned a unique Internet address, to which the subscribers connect through telephone lines. The telephone service linking the user and the ISP is classic 'telecommunications,' which the Communications Act defines as 'the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.' 47 U.S.C. §153 (43). A provider of

telecommunication services is a 'telecommunications carrier,' which the Act treats as a common carrier to the extent that it provides telecommunications for the public, 'regardless of the facilities used.' 47 U.S.C. §153 (44) & (46).

* * *

Like other ISPs, @Home consists of two elements: a 'pipeline' (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are that of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.[33]

Finally, the court observed that the undecided policy question of whether to regulate – the FCC's stated reason for declining to offer its view on the statute – was still in the FCC's hands. Section 10 of the Communications Act permitted the FCC to forebear from regulating telecommunications service on a showing "that such action is unnecessary to prevent discrimination and protect consumers, and is in the public interest." 216 F.3d at 879. It would be up to the FCC, the court held, to determine whether to forebear from regulating cable modem service under these provisions. *Id.*

The court's decision prompted the Commission finally to question whether it could continue to stay on the sidelines – what the respondents had criticized as a policy of de facto forbearance. Citing the Portland decision, and two other decisions it declared to be in conflict with the court's

[33] *City of Portland, supra*, 216 F.3d at 877-78.

ruling,[34] the FCC launched a Notice of Inquiry for the stated purpose of reexamining its so-called "hands off" policy regarding regulation of the Internet. *NOI*, ¶ 4. That policy, it explained, was based "on the belief that 'multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers." *Id.* The *NOI* asked for comments on a number of questions, including whether cable modem service included a telecommunications service as the Ninth Circuit had held in City of Portland, or was some other service, such as cable service, information service or private carriage. *Id.* at ¶¶ 16, 17, 18, 21, 22. It then asked whether, as a matter of public policy, a cable modem access requirement would retard deployment of broadband service, whether an open access requirement was technically feasible and whether, assuming cable modem service was a telecommunications service, it could nonetheless "forebear" from regulating the service under Section 10 of the Communications Act. *Id.* at. ¶¶ 44, 47, 48, 53-56.

The *NOI* elicited comments from hundreds of parties. ISPs as well as various public agencies invoked the Portland decision that the transmission component of cable modem service was a telecommunications service subject to the common carrier provisions of the Communications Act and urged the FCC to decide the question on the basis of the court's ruling.[35] Even if cable operators did not offer the transmission component of cable modem service on a stand alone basis, noted several parties, the FCC's decision in *Computer II* meant that they were required to do so since cable operators were offering it on an indiscriminate basis to the public using their own facilities. *See Declaratory Ruling*,

[34] *NOI*, *supra* note 1, at ¶ 4 (citing *MediaOne Group, Inc. v County of Henrico*, 97 F. Supp. 2d 712 (E.D. Va. 2000) and *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000)).

[35] *See, e.g.*, Comments of the Competitive Access Coalition, FCC GN Docket No. 00-185 (December 1, 2000) *available at* <http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512159329 (last visited Sept. 24, 2004) [hereinafter *CAC Comments*]

¶ 42 n.167. *Computer II*, they argued, required any facilities-based carrier (in simple terms, carriers owning their own wires) including cable operators, to unbundle the underlying transmission capacity of their cable modem services and make it available to other information service providers. *Id.* In addition, several commented that forbearance could not be justified; cable companies dominated broadband deployment and their dominance required continued regulation to protect consumers and competition.[36] The limited competition available from telephone companies providing DSL access could not justify forbearance either, the commenters argued, since the provision of DSL service was itself subject to non-discriminatory access requirements that the FCC had only months earlier found it necessary to strengthen.[37] As to concerns about feasibility, these commenters submitted comments and affidavits detailing their position that non-discriminatory access was indeed feasible and would not retard deployment or depress investment in broadband upgrades to cable systems.[38]

For their part, the cable companies dismissed the Portland decision as "dicta"[39] and maintained that (1) cable modem service was either a cable service exempt from common carriage requirements, private carriage (also exempt), infeasible to provide on a common carrier basis, unnecessary to provide to independent ISPs or (2) that the FCC should forebear from regulating cable modem service under Section 10 of the Communications Act.[40]

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[36] *CAC Comments, supra* note 35, at 45-69.
[37] *Id.* at 51.
[38] *See, e.g.*, Attachment 15 to *CAC Comments*, Jeffrey K. Mackie-Mason, *Investment in Cable Broadband Infrastructure: Open Access is Not an Obstacle* (Nov. 5, 1999) (unpublished report, University of Michigan), *available at* <http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512159615> through 6512159617. (last visited Sept. 20, 2004).
[39] NCTA Comments at 10.
[40] *Id.* at 2, 14-17, 69-81, 39-67.

The Commission took no action on the comments for a considerable period. In the meantime, AOL completed its merger with Time Warner and, dispelling the technical feasibility argument, accepted a merger condition insisted upon by the Federal Trade Commission and the FCC to address market power concerns: the merged company would offer ISPs access to cable modem service on a non-discriminatory basis and would reach agreement to provide such service to at least three independent ISPs before it could offer AOL service, with compliance to be overseen by a special master.[41]

On February 15, 2002, and presaging the action it would take the following month, the FCC issued its *Wireline Broadband NPRM*, a notice of proposed rulemaking that it termed the "functional equivalent" of the Cable Modem *NOI* it had issued in 2000.[42] Its focus in that case was the appropriate regulatory classification of DSL service, a broadband service offered over telephone wires. The FCC's stated objective was to adopt a "functional approach" to classification of broadband platforms, "focusing on the nature of the service provided to consumers rather than one that focuses on the technical attributes of the underlying architecture." [43] At the time it issued the *Wireline Broadband NPRM* the FCC already had a policy governing broadband over wireline facilities. Based on its own "description of the *Computer II* and *Computer III* regulatory framework," the FCC stated, "the obligations deriving from those proceedings currently apply to the provision of wireline broadband Internet access services by facilities-based telephone companies."[44] In other words, telephone companies were (and still are) required to offer DSL transmission on a stand-alone

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[41] *See FCC AOL Time Warner Merger Order, supra* and *FTC AOL Time Warner Merger Order, supra.*
[42] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Notice of Proposed Rulemaking*, 17 F.C.C.R. 3019, ¶ 9 (2002) [hereinafter *Wireline Broadband NPRM*].
[43] *Wireline Broadband NPRM, supra* note 46, at ¶ 7.
[44] *Id.* at ¶ 22.

basis to competing ISPs. Although the "*Computer II* and *Computer III* framework" had been developed prior to passage of the '96 Telecommunications Act, the FCC had found, as noted earlier, that the framework had been incorporated into the new Act. Thus, by the time of the 2002 *Wireline Broadband NPRM* the FCC had been applying the "*Computer II* and *Computer III* regulatory framework" to wireline broadband for nearly six years. Nonetheless, the NPRM proclaimed that there were now "very different legal, technological and market circumstances" than when it "initiated the Computer Inquiry line of cases."[45] *Computer II* and *Computer III*, it stated, dealt with "*traditional* information services provided by facilities-based common carriers." [46] In other words, it explained, the "core assumption underlying the *Computer Inquiries* was that" information providers would be providing "narrowband applications."[47] By contrast, it explained, new broadband technology "allows users to interact with media, with information and with each other in way and at speeds that were scarcely considered when the Computer Inquiry began." [48] Its proposed solution was to declare that, if the wireline carrier bundles Internet access with broadband transmission, the whole offering becomes an unregulated information service.[49]

A month later, the FCC issued its *Declaratory Ruling* in the Cable Modem proceeding. Similar to its *Wireline Broadband NPRM*, it reached the conclusion that a bundled offering of broadband transmission over cable and Internet access was a single, unregulated information service. *Declaratory Ruling*, ¶ 39. Its treatment of the *Computer II* and *Computer III* regulatory framework, however, was very different. While the *Wireline Broadband NPRM* proposed a change in the extant requirement that wireline companies offer DSL on a non-discriminatory basis to competing ISPs, the *Declaratory Ruling* announced that the two functions were a single service and that the "telecommunications component" *could not* be separated "from the data processing capabilities of the service." *Declaratory Ruling*, ¶ 39. Further, while the *Wireline Broadband NPRM* declared that *Computer II* and *Computer III* were not fashioned to deal with broadband, the *Declaratory Ruling* concluded that *Computer II* and *Computer III* were inapplicable because they were only intended to deal with telephone wires, not coaxial cable.[50] In both cases, however, the FCC explained that its classifications of DSL and cable modem service were driven by its "primary goal to encourage the ubiquitous availability of broadband"[51] and its belief that, to achieve this end, "broadband services should exist in a minimal regulatory environment."[52]

The March, 2002 FCC order had two parts. The first part consisted of the *Declaratory Ruling* that became the

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[45] *Id.* at ¶ 37. Just what "different legal, technological and market circumstances" the FCC, in fact, had in mind are far from clear. As to changed legal circumstances, it seems implausible that the FCC could have meant the passage of the '96 Act. In the NRPM itself the FCC states that classification of "information services" under the '96 Telecom Act is just an incorporation of the "enhanced services" concept adopted in *Computer II*. *Id.* at ¶ 18 n.38. Nor does the reference to "technological" changes make much sense either. The whole purpose of the *Computer* line of cases was to ensure that technological advances in enhanced services promised by robust competition among enhanced service providers would not be stifled by common carriers seeking to limit that competition. Finally, the market circumstance today, again by the FCC's own account, is that the marketplace for broadband is "very highly concentrated" (*see* n.14, *supra*), the very circumstance that, without unbundling, would impede technological innovation.

[46] *Id.* at ¶ 22 (emphasis added).

[47] *Id.* at ¶ 36.

[48] *Id.*

[49] *Id.* at ¶¶21; 24.

[50] "The Commission," it held, "has never before applied [*Computer II*] to information services provided over cable facilities" and "we decline to extend *Computer II* here." *Id. at* ¶ 43. It offered the explanation that *Computer II* -- which requires unbundling of telecommunications services -- was only meant to apply to facilities-based telephone companies, not cable companies providing telephone services. *Id.* at ¶ 44.

[51] *Wireline Broadband NPRM*, *supra* note 46, at ¶ 3.

[52] *Id.* at ¶ 5. *See also Declaratory Ruling*, *supra* note 2, at ¶ 5.

subject of the case before the Ninth Circuit. In it, the FCC declared, as just noted, that cable modem service is an "information service" exempt from either the common carrier requirements of Title II of the Communications Act governing providers of telecommunications services or Title VI, governing the provision of cable services. It also purported to "clarify" that cable modem service was not only an information service, but an "*interstate* information service." *Declaratory Ruling*, ¶ 59 (emphasis added). While cable modem service employed telecommunications facilities, it held, the service was an integrated "information service" and "there [was] no separate telecommunications service offering to subscribers or ISPs." *Id.* at ¶ 33. The Ninth Circuit's contrary decision in *Portland*, it added, was "based on a record that was less than comprehensive," and was decided without "the benefit of briefing by . . . the Commission" which, although participating as *amicus curiae*, "did not provide its expert opinion on this issue." *Id.* at ¶¶ 57-58.

As previously noted, the FCC also rejected the position that *Computer II* required cable companies to offer the transmission component of its cable modem service to competing ISPs. More specifically, it stated that, with respect to the argument that cable companies were common carriers because they were already using their cable facilities to provide unbundled telephone service, *Computer II* -- which requires unbundling of telecommunications services -- was only meant to apply to facilities-based telephone companies, not cable companies providing telephone services. *Id.* at ¶ 44. In any event, it held, even if it were wrong, it was going to waive *Computer II* requirements on its "own motion" because it did not want to "create an open access regime for cable Internet service only to some operators." *Id.* at ¶ 45.

Finally, acknowledging that some arrangements between cable companies and third party ISPs might involve the provision of an "'input' that is a stand-alone transmission service, making the ISP an end-user of 'telecommunications'

as that term is defined in the Act," it asserted that there was insufficient information in the record to determine the extent of such arrangements. *Id.* at 54. Citing AOL Time Warner's assertion that it was negotiating access "on an individual basis," the FCC concluded that if such arrangements existed, they would not constitute telecommunications services either, but "would be a private carrier service," as would similar stand-alone telecommunications offerings by other cable companies made on "an individualized basis." *Id.* at ¶ 55. The Commission did not explain how AOL Time Warner would be both an exempt private carrier and still subject to an FCC merger requirement "prohibiting specific kinds of discrimination against unaffiliated ISPs, their first screens, their content, and the quality of service afforded them." *Id.* ¶ 2 n.8.

Appended to the *Declaratory Ruling* was a Notice of Proposed Rulemaking in which the FCC tentatively concluded that, if, despite its explanations, cable modem service were held to include a common carrier telecommunications service, it would forbear from regulating the service, thereby achieving essentially the same result. And, to make sure its approach to DSL access was on a par, it concluded that it should forbear from regulating certain broadband services by telephone companies too. *Id.* at ¶¶ 94, 95.

In his dissenting opinion, Commissioner Copps described what he viewed as the result-oriented nature of the Commission's analysis:

> The Ruling seems uneasy with its own conclusions. Just in case we are wrong, and access requirements were to apply, they are waived, on the Commission's own motion, with neither notice nor comment. And if even that stretch somehow fails to get the point across, the NPRM adopted today also takes steps to ensure that these services remain deregulated in the face of any court opinion to the contrary. Even if cable modem services are found by the courts to be subject to

> regulation, the Commission would forbear from enforcing those obligations. So, in this analysis the majority makes a determination, but just in case it got the determination wrong, it waives the rule it determined did not apply, and, should the courts disagree, we simply forbear from enforcing the rule. That's a far distance down the road from the simple *NOI* we are working from, isn't it?[53]

Promptly after the FCC issued its *Declaratory Ruling*, Brand X, a California ISP, brought its petition for review to the Ninth Circuit. Similar petitions were filed by Earthlink, a national ISP, the Consumer Federation of America and the California Public Utilities Commission in the D.C. Circuit but were transferred to the Ninth Circuit by lottery. On October 6, 2003, a three member panel issued its *per curiam* decision in *Brand X Internet Services v. FCC*,[54] reversing the FCC. Addressing the FCC's claim that the statute was ambiguous and that its interpretation was therefore entitled to *Chevron* deference, the court pointed out that, while it had "never explicitly stated in *Portland* that our interpretation was the only one possible, we never said the statute was ambiguous." 345 F.3d at 1131. Expanding on this point in his concurrence, Judge Thomas, who had authored the *Portland* decision, stated that the Court in *Portland* "did not discern any ambiguity in the statutory meaning for the agency to interpret." *Id.* at 1135. In any event, the court concluded, *Chevron* was inapplicable where, as in *City of Portland*, the court had already interpreted the statutory provision in question.[55] It offered two grounds for its ruling.

[53] DOJ app. at 200a.
[54] *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003) [hereinafter *Brand X*].
[55] *Id.* at 1132.

The Supreme Court's decision in *Neal v. United States*,[56] the panel explained, holds that the *Chevron* deferential review does not apply where, as in the *Brand X* case, the Supreme Court or a circuit court has previously interpreted the statutory provision in question and that *Neal*, therefore, "required our adherence to the interpretation of the Communications Act we announced in *Portland*." [57] The panel ruled that it was also bound by the circuit's earlier decision in *City of Portland* under the longstanding circuit rule announced by the court *en banc* in *Mesa Verde Construction Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988)(*en banc*).[58] Under *Mesa Verde*, the panel noted, circuit "precedent can be disregarded in favor of a subsequent agency interpretation 'only where [unlike the case in Brand X] the precedent constituted deferential review of [agency] decision making.' " [59]

In the months immediately preceding and following the panel decision, the Department of Justice, which had joined in the FCC's merits briefs to the panel, began voicing serious reservations about the FCC's position. CALEA, the Communications Assistance for Law Enforcement Act, 47 U.S.C. § 1001 *et seq.*, grants the federal government certain

[56] 516 U.S. 284, 294-95 (1996). The *Brand X* panel, quoting *Neal*, concluded that it applied, not only to Supreme Court decisions, but to the decisions of lower courts as well:

> Notwithstanding the Supreme Court's use of the term "we," there is nothing to suggest that *Neal*'s rule should apply only when it is the Supreme Court (and not the courts of appeals) construing the statute in question, and the Court itself has never asserted that the power authoritatively to interpret statutes belongs to it alone. *See, e.g., Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) ("*[J]udicial* construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.") (emphasis added); *accord United States v. Mead Corp.*, 533 U.S. 218, 248-49 (Scalia, J., dissenting).

Brand X, supra note 58, at 1132.
[57] *Brand X, supra* note 58, at 1131-32.
[58] *Id.* at 1130-31.
[59] *Id.* at 1130 (quoting *Mesa Verde, supra*).

powers to conduct electronic surveillance, but contains an express exemption for "information services." Because that term is given the same definition under both CALEA and the '96 Telecommunications Act (compare 47 U.S.C. §1001(6) and 47 U.S.C. § 153(20)), the Department of Justice cautioned the FCC, in a letter written only months before the *Brand X* decision was issued, that "[a]ny classification of Internet access as an information service would implicitly classify broadband telephony delivered via Internet access as an 'information service,' thus raising doubts about whether those access providers are 'telecommunications carriers' for purposes of CALEA." DOJ and FBI Ex Parte Presentation In The FCC's Broadband Internet Access Proceedings (July 10, 2003), at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514285462 (visited Sept. 24, 2004). After the *Brand X* decision issued in October, 2003, the FBI reiterated this concern in a November 25, 2003 letter to the FCC, stating that, "no matter what theory the Commission chooses to use" to fulfill its CALEA obligations, one thing it cannot do is "classify internet access service as a pure information service."[60] A month later, the Solicitor General's office joined in a similar letter. The FCC's classification of internet access service in the Cable Modem *Declaratory Ruling* as a pure information service "suffers from statutory interpretation problems and directly threatens CALEA," it stated in a letter signed by, among others, Deputy Solicitor General Hungar.[61] Then, in what the New York Times described as a "highly unusual step,"[62] the Department of Justice "decided to permit the FCC" to petition for rehearing en banc of the *Brand X* panel decision, but refused to join in the petition itself. *Id.*[63]

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[60] App. at 5a.
[61] Earthlink App. at 14a.
[62] Stephen Labaton, *Easing of Internet Regulations Challenges Surveillance Efforts*, N.Y. Times (Jan. 22, 2003) § A , at 1.
[63] *Id.*

Ultimately, "no active judge requested a vote on whether to rehear the matters en banc," National Cable and Telecommunications Association ("NCTA") App. 188a, and the FCC and NCTA rehearing petitions were denied on March 31, 2004. The Solicitor General subsequently requested, and was granted, two extensions of time to decide whether to seek certiorari. Three weeks before the last extension was to expire, the FCC issued a notice of proposed rulemaking announcing a new interpretation of CALEA that, it said, would allow the government to reach cable modem service, notwithstanding its classification as solely an information service under the '96 Telecommunications Act. *See In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, Notice of Proposed Rulemaking and Declaratory Order,* FCC Nos. ET Docket No. 04-295 and RM-10865 (Aug. 9, 2004). Shortly thereafter the Solicitor General and the FCC jointly filed a petition for certiorari with this Court, as did the cable industry.

REASONS FOR DENYING THE WRITS

The FCC and NCTA advance essentially three arguments in support of their petitions for certiorari. (1) They claim that the Ninth Circuit misapplied the *stare decisis* principles articulated by this Court in *Neal*, *Lechmere* and *Maislin*, (2) they argue that the Ninth Circuit's ruling is at odds with the opinions of several other circuits and (3) they urge the Court to consider the FCC's *Chevron* deference claims directly (*i.e.*, as if *Brand X* had never been issued) because of the national importance of the case. On the last point it bears emphasis that the FCC seeks certiorari, not on the basis that its interpretation would be sustained under *Chevron*, but only that "further review is warranted." FCC Pet. at 15. The protestations of the FCC and NCTA notwithstanding, they have presented no question warranting the attention of this Court.

The Ninth Circuit Correctly Applied *Neal*

Although Petitioners claim error in the lower court's *per curiam* application of this Court's decisions in the *Maislin*, *Lechmere* and *Neal* line of cases, that court applied the settled principles of *stare decisis* established in those cases. In concluding that its earlier decision in *AT&T v. City of Portland* had established the plain meaning of the 1996 Telecommunications Act and that the FCC's subsequent and contrary interpretation of the same Act had to yield, it did no more and no less than *Maislin*, *Lechmere* and *Neal* required.

In disputing the lower court's holding, the FCC makes the strained argument that the *stare decisis* principle in *Neal* applied only to those precedents in which a court had not only interpreted the statute in question, but had expressly found the statute unambiguous, thereby obviating the need for a "step two" *Chevron* analysis. FCC Pet. at 22-23. NCTA makes a similar argument. NCTA Pet. at 24-25.[64] The argument, however, makes no sense. It is "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). "Once we have determined a statute's meaning," this Court stated in *Neal*, "we adhere to our ruling under the doctrine of *stare decisis*, and we assess the agency's later interpretation of the statute against that settled law." 516 U.S. at 295. In other words, "in

[64] Hedging its bets, NCTA also argues that *Neal* (but not discussing predecessor cases *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) or *Lechmere Inc. v. NLRB*, 502 U.S. 527 (1992)) is "*dictum*" and that, in any event, its application "impedes uniformity among the circuits." NCTA Pet. at 27. By NCTA's own description, *Neal* applies the "***Maislin rule***," (*Id.* at 25, emphasis added) rendering its unexplained and contradictory claim that *Neal* was mere *dictum* wholly meritless. Its "uniformity" concern is also self-contradictory. That argument runs smack into NCTA's acknowledgment, voiced pages earlier, that, "under the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, the classification question cannot be relitigated in other circuits." NCTA Pet. at 21. NCTA's argument thus seems to be an objection to the fact that, under the law's current lottery system, a single circuit's review of agency action can establish binding nationwide precedent. In that case, however, its remedy lies with Congress, not the Supreme Court.

Chevron terms," once the court has interpreted the statute it is no longer ambiguous; its plain meaning has been ascertained by the court. *Lechmere, supra*, 502 U.S. at 537. Indeed, in a case where, as in *Portland*, a court is reviewing a statute directly, there would be no reason to conduct a *Chevron* analysis (*Chevron U.S.A., Inc. v. Natr'l Resources Defense Council, Inc.*, 467 U.S. 837 (1984)) to expressly declare a statute ambiguous or not (although a court might opine on the statute's clarity in explaining its decision). The FCC's interpretation of *Neal* would rob it of any meaning, for if a statute is ambiguous it would render *Neal* inapplicable and if a statute were unambiguous, it would render *Neal* irrelevant.

The argument that the Ninth Circuit's position is at odds with other circuit interpretations of *Neal* is also far wide of the mark. Insofar as respondents can ascertain, the Ninth Circuit and the two other circuits that have applied *Neal*, *Lechmere* or *Maislin* have concluded that an agency's interpretation cannot trump their own prior interpretations of the statute. *See ITT Industries, Inc. v. NLRB*, 251 F.3d 995 (D.C. Cir. 2001);[65] *Bankers Trust New York Corp v. U.S.*, 225 F.3d 1368, 1376 (Fed. Cir. 2000). This is not to say that a court cannot reverse its precedent in the exercise of its own judgment. Several circuits have, as petitioners have noted, *chosen* to revisit their prior statutory interpretations in light of subsequent agency interpretations of the same statutory provisions.[66] In this case, however, since the petitioners never claimed – and still do not claim – that *Portland* was incorrectly decided, the Ninth Circuit was given no reason to revisit its *Portland* decision. But even where an agency urges a court to reverse its precedent, *Chevron* does not dictate that a court *yield* to the agency's interpretation. As Justice Scalia

[65] NCTA erroneously claims that the D.C. Circuit has not applied *Neal*. *See* NCTA Pet. at 22.

[66] These courts, as nn.11 & 12 of the NCTA brief recount, have *elected* to reverse precedent, noting that they are "not precluded from revisiting" earlier rulings, or from looking at a "new source of enlightenment," or reversing course in order to "to promote uniformity" among the circuits. *Id.*

observed in *United States v. Mead Corp.*, 533 U.S. 218, 248-49 (2001) (Scalia, J., dissenting), "I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency - or have allowed a lower court to render an interpretation of a statute subject to correction by an agency."

The FCC Has Presented No Compelling *Chevron* Issue for This Court to Decide.

To be sure, this Court is not bound to adhere to the Ninth Circuit's *Portland* decision. Notwithstanding the lower court's correct application of *Neal*, this Court could engage in its own *Chevron* analysis of the FCC's *Declaratory Ruling* if it so chooses. There is, however, no compelling *Chevron* issue for this Court to settle.

The threshold question in any *Chevron* analysis is whether the statutory provisions in question are ambiguous, but there is no statutory ambiguity in this case. All parties agree that cable modem service includes a "telecommunications" component under the '96 Act. The Act, as noted earlier, defines "telecommunications service" as the "offering of telecommunications for a fee directly to the public." Cable modem service is heavily marketed directly to the public and nothing in the Act suggests that the transmission service "offering for a fee to the public" loses its regulated character by being bundled with an information service. Not surprisingly, the Ninth Circuit's earlier *City of Portland* decision did not find the statute in question ambiguous, a point the lower court expressly noted in *Brand X*. On the contrary, the lower court in *City of Portland* found no need to look, by its own description, beyond the "plain language" of the '96 Act, 216 F.3d at 876 and, for corroboration, found its interpretation consonant with the 1998 interpretation of the same statutory provisions applied by the FCC itself to analogous DSL service. *Id.* at 879. Even if petitioners were to clear the ambiguity hurdle, however, the FCC has not presented much of a case for deference.

When an agency changes its long-standing interpretation of a statute, its latter interpretation is "entitled to considerably less deference." *Good Samaritan Hospital v. Shalala*, 508 U.S. 402 (1993), citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987). *See also Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991). This is precisely the case where, as here, a conflicting 1998 agency interpretation applied to analogous DSL service (*Deployment of Wireline, supra*) was not only more nearly contemporaneous with the statute,[67] but has its roots in the decades-old agency policy (*Computer II*) that formed the very basis for the statutory provisions in question.[68]

Compounding the FCC's credibility problem, the *Declaratory Ruling* and the *Wireline Broadband NPRM* – issued only a month apart -- offer conflicting explanations for the same statutory conclusion. While a change in an agency's interpretation of a statute is not "fatal" to its claim of deference, *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996), it must at least offer a reasoned explanation for its change in course. *Id.* In explaining its cable modem ruling, however, the FCC asserts that the *Computer II*

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[67] An administrative "practice has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978), *quoting Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933). *See also Watt v. Alaska*, 451 U. S. 259, 272-73 (1981) (holding that agency's interpretation of amendment that was contemporaneous with amendment's passage was entitled to considerably more deference than agency's current, inconsistent interpretation).

[68] *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) ("great weight" is to be accorded "longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has reenacted the statute without pertinent change.") *See also, Smiley, supra*, 517 U.S. at 740 ("agency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist"). In this case, the longstanding agency *Computer II* policy was codified in the '96 Act's definitions of "telecommunications service" and "information service."

framework incorporated into the '96 Telecommunications Act was only intended to apply to telephone lines (*Declaratory Ruling* at ¶ 44) – despite the express language in the Act stating that transmission service was transmission service "regardless of the facilities used." 47 U.S.C. § 153(46). Besides, it claims, the "telecommunications component is not, however, separable from the data processing capabilities of the service," but instead constitutes one integrated information service. *Declaratory Ruling* at ¶39. Seeking to declare bundled DSL and Internet access an unregulated information service too, it offers a completely contradictory explanation. Since DSL *is* provided using telephone wires it cannot claim that the nature of the facilities makes *Computer II* inapplicable. And, since the FCC had for years been requiring telephone companies to offer DSL unbundled from data processing, it could not very well argue that the two components formed an inseparable whole. Instead, it explained that the *Computer II* framework of the '96 Act was inapplicable to DSL because *Computer II* was only intended to apply to narrowband, not broadband. *Wireline Broadband NPRM* at ¶ 36. This, too, was a hard sell since the FCC had already ruled in 1998 that the '96 Act *did* apply the *Computer II* framework to broadband. *Brand X Internet Services*, 345 F.3d at 1137.

If a lower court's proper application of *Neal* is to have any import at the level of Supreme Court review, its reasonable prior interpretation of a statute must also detract from any deference the agency might otherwise be due.[69] This is particularly important in the context of litigation under the '96 Telecommunications Act, where the statute expressly contemplates private causes of action[70] and where

[69] The *Portland* decision, moreover, was binding on litigants in the Ninth Circuit. *See e.g., GTE.Net LLC v. Cox Communications, Inc.*, 185 F. Supp. 2d 1141 (S.D. Cal. 2002). A changed agency interpretation that "does not take account of legitimate reliance on prior interpretation" may also be arbitrary. *See, e.g., Smiley, supra*, 517 U.S. at 740.

[70] *See, e.g.*, 47 U.S.C. § 207 (2004).

judicial interpretations of the statute without benefit of prior agency interpretations are therefore inevitable. To top all of this off, the agency and the Solicitor General are asking this Court to give deference to a statutory interpretation that the Solicitor General's office found unreasonable just nine months ago. The Solicitor General apparently only goes along with the FCC now because the FCC has announced a brand new interpretation of CALEA that, if upheld, would allow the government to conduct electronic surveillance over cable modem service, notwithstanding its classification as an information service under the '96 Act.

In weighing whether to grant certiorari, the Court should further keep in mind that when the Ninth Circuit had before it the petitions for rehearing en banc submitted by the FCC and the NCTA it was free to revisit the correctness of its earlier *City of Portland* decision, but chose not to do so. This was hardly a surprising decision, as neither petitioner argued – and still have not argued – that *City of Portland* was incorrectly decided. In fact, not a single member of the court voted to poll other members on whether to hear the case en banc.

Finally, and this is no small point, the FCC's interpretation, as the Solicitor General's office has itself argued, is simply unreasonable. The FCC's position, in brief, is that a company owning telecommunications facilities – even one owning an absolute monopoly over such facilities – can escape the regulation of any telecommunications service it chooses to offer the public over such facilities by simply packaging the service with an unregulated "information service." Not only is there nothing in the '96 Act stating that "telecommunications service" loses its regulated character *unless* it is offered separately, the very notion that such a requirement could reasonably be read into the statute is preposterous. In the words of one commentator, the FCC's bundling rationale is part of a "deregulatory quest" that allows "all telecommunications service providers the ability

to free themselves of any and all common carrier burdens."[71] As the FCC itself has said in applying *Computer II*, under such an interpretation a common carrier "would be able to avoid *Computer II* and *Computer III* unbundling and tariffing requirements for any basic service that it could combine with an enhanced service." "This," it wisely concluded, "is obviously an undesirable and unintended result."[72] *Mississippi River Transmission Corp. v. FERC*, 969 F.2d 1215 (D.C. Cir. 1992), a case involving analogous provisions of the Natural Gas Act, is to similar effect. There, the D.C. Circuit upheld the Federal Energy Regulatory Commission's jurisdiction to regulate interstate transportation of natural gas sold under a bundled arrangement:

> FERC is not barred from regulating a pipeline's interstate transportation of natural gas merely because the sale of gas being transported is not itself subject to federal regulation. FERC's authority over such transactions is beyond dispute.

Id. at 1217. Any other rule, the court observed, would invite manipulation by the utility, which could avoid regulation by offering bundled pricing of the same services:

> As far as the statute is concerned, there would have been no doubt of FERC's section 1(b) authority if MRT, instead of charging a bundled price, had charged separately for transporting the gas and for the gas itself. *To accept MRT's position would therefore be tantamount to conferring on private parties the power whether FERC could set the rate for interstate transportation.* Private parties would have this power because it would be entirely up to them whether to structure a direct sale and interstate transportation in terms of a bundled price or separate charges.[73]

[71] Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and New Layered Approach*, 55 Fed. Comm. L.J. 207, 230 (2003).
[72] *Frame Relay Order*, *supra* 10 F.C.C.R. 13719.

Granting Certiorari Would Send the FCC a Signal That It Can Circumvent the Statutory Requirements For Exercising Its Forbearance Authority.

Maislin, *Lechmere* and *Neal* aside, this is a particularly poor vehicle for Supreme Court de novo review under *Chevron* of the FCC decision the Ninth Circuit reversed. Despite the observation by two members of this Court that the FCC has avoided the question "no less than six times in recent years," *NCTA v. Gulf Power Co.*, 534 U.S. 327, 357, (2003) (Thomas, J. and Souter, J. concurring and dissenting), the FCC consciously chose to not to classify cable modem service – engaging in years of deregulation by inaction – de facto forbearance – as a means to encourage broadband deployment rather than invoking its forbearance authority if it thought regulation was unnecessary.

On brief, the FCC argues that review is needed now because "the possibility that the Commission might forbear from applying certain telecommunications service requirements is no substitute for correctly classifying cable modem service in the first instance." FCC Pet. at 27. "Forebearance proceedings," it adds, "would be time-consuming and hotly contested." *Id.* at 28. It bears no small emphasis that in its 2002 *Declaratory Ruling*, after compiling a comprehensive record on the issue, the FCC already made a tentative decision to forbear from regulating cable modem service, *Declaratory Ruling* at ¶¶ 94, 95, a decision it remains empowered to finalize at any time – essentially mooting the case if it so wishes. The FCC's concern that the factual showing needed to support that tentative decision (a decision it already presumably thought supportable from the facts

[73] *Id.* at 1218 (emphasis added). This Court too, has affirmed a similar exercise by the FERC's predecessor, the Federal Power Commission, over the transportation component of a direct sale of natural gas. *See FPC v. Louisiana Power & Light Co.*, 406 U.S. 453 (1972).

before it) may be time consuming to develop, that the case for forbearance may be difficult to establish and that "there is no way to predict in advance the ultimate outcome of such proceedings," seems more a plea that it should be permitted to circumvent the cumbersome statutory forbearance process than an articulation of a legal principle worthy of Supreme Court review. The "time-consuming" process about which it complains is precisely the vehicle chosen by Congress to ensure that forbearance is "consistent with the public interest." 47 U.S.C. § 160(a)(3). To grant certiorari here would send a message to agencies that they could ignore their duty to administer statutes without fear that they would be bound by the decisions of courts forced to act in the face of the agency's conscious inaction.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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Counsel for Brand X Internet Services

September 30, 2004

APPENDIX

[Logo]

CALEA Implementation Unit
14800 Conference Center Drive
Suite 300
Chantilly, Virginia 20151

November 25, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation
(CC Docket Nos. 02-33, 95-20 and 98-10; CS Docket No. 02-52)

Dear Ms. Dortch:

Pursuant to Section 1.1206(b) of the Commission's Rules, 47 C.F.R. § 1.106(b), the Federal Bureau of Investigation ("FBI") hereby submits notice of an *ex parte* meeting on November 24, 2003.

The FBI representatives who attended the meeting were Supervisory Special Agent Gregory M. Milonovich of the FBI's CALEA Implementation Unit and Martin J. King of the FBI's Office of General Counsel. Also participating in the meeting on behalf of the FBI were Joel M. Margolis, Valerie M. Furman and Kevin D. Minsky, consultants to the FBI's CALEA Implementation Unit.

The Commission staff members who attended at the meeting were Julius Knapp, Geraldine Matisse, Jerome Stanshine and Jeffrey Goldthorp of the Office of Engineering and Technology, J. Scott Marcus of the Office of Strategic Planning, Susan Aaron of the Office of the General Counsel, Cathy Zima, David Ward, Thomas J. Beers, Michael Goldstein, and Alan Feldman of the Wireline Competition Bureau, and Stanley Wiggins, William Lane, and John Spencer of the Wireless Telecommunications Bureau.

The purpose of the meeting was to discuss the Communications Assistance for Law Enforcement Act ("CALEA"), 47 C.F.R. § 1001 *et seq.*, in the context of the above-referenced dockets.[1] The attached memorandum summarizes the substance of the meeting.[2]

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[1] See In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002); In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002).

[2] At the request of members of the FCC's staff, Mr. Milonovich also provided the Commission with a brief update regarding a recently-issued FBI publication that details law enforcement's electronic surveillance needs for public Internet protocol network access service (PIPNAS).

Respectfully submitted,
THE FEDERAL BUREAU OF INVESTIGATION

/s/ Gregory M. Milonovich
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Alan Feldman (via electronic mail)
Stanley Wiggins (via electronic mail)
William Lane (via electronic mail)
John Spencer (via electronic mail)

SUMMARY OF POINTS MADE
IN FEDERAL BUREAU OF INVESTIGATION
NOVEMBER 24, 2003 *EX PARTE* PRESENTATION

- The purpose of the Communications Assistance for Law Enforcement Act ("CALEA"), 47 C.F.R. § 1001 *et seq.*, is to ensure that lawful electronic surveillance keeps pace with changes in telecommunications technology as telecommunications services migrate to new technologies.
- CALEA's application is technology neutral.
- Internet access service is an important emerging technology used for electronic communication.
- Internet access service can be used to deliver a wide variety of communications, including voice-over-internet-protocol ("VOIP") service, which is functionally identical to traditional telephony, as is expected to replace the existing circuit switched network.
- The Commission has already prepared itself to apply CALEA to emerging technologies by stating in the *CALEA Second Report and Order* that it would preserve the CALEA definitions of "telecommunications service" and "information service," despite the independent purposes of the Communications Act.
- The Commission is required by Section 229 of the Communications Act, 47 C.F.R. § 229, to make all rules necessary to fulfill the statutory goals of CALEA.
- The intent of CALEA is to require the Commission to adopt rules making Internet access service providers subject to CALEA.
- There are multiple legal theories under which the Commission can preserve the CALEA classification scheme and ensure CALEA coverage of Internet access service:
  - The Commission can classify Internet access service as a "telecommunications service";

  - The Commission can find – consistent with both its prior pronouncement that CALEA covers digital subscriber line service as a joint use facility and the Ninth Circuit Court's recent holding in the *Brand X* case – that Internet access contains both a "telecommunications service" and an "information service."
  - The Commission can classify Internet access service providers as CALEA "telecommunications carrier."
  - The CALEA definition of "telecommunications carrier" is different from and broader than the Communications Act definition of that term, thus permitting a different and broader interpretation.
  - CALEA never classified Internet access service as an "information service."
  - The CALEA definition of "information service," combined with CALEA's legislative history, indicates Internet access service should be covered by the statute.
- No matter what theory the Commission chooses to use to fulfill its obligation to preserve the CALEA definitions, it may not classify Internet access service as a pure "information service" because that could arguably overturn the CALEA definitions and impermissibly interpret CALEA in a manner that would defeat its purpose.
- Any ruling that permits Internet access service providers to escape their CALEA responsibilities would frustrate the ability of law enforcement agents to keep pace with this emerging technology.
  - By implication, such a ruling could ultimately block law enforcement from conducting CALEA-enabled lawful electronic surveillance on the Internet-based communications services of the future.

- Given Chairman Powell's statement that Homeland Security is at the forefront of his policy goals for the Commission, ensuring CALEA coverage of Internet access should be his top priority in the pending Internet access proceedings.